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1ST SESSION

S. 1566

[Report No. 95-604]

IN THE SENATE OF THE UNITED STATES

MAY 18 (legislative day, MAY 16), 1977

Mr. KENNEDY (for himself, Mr. BAYH, Mr. EASTLAND, Mr. INOUE, Mr. McCLELLAN, Mr. MATILIAS, Mr. NELSON, Mr. TITMUND, Mr. HUDDLESTON, and Mr. GARN) introduced the following bill; which was read twice and referred by unanimous consent to the Committee on the Judiciary, and, if and when reported, then to the Select Committee on Intelligence

NOVEMBER 15 (legislative day, NOVEMBER 1), 1977

Reported by Mr. KENNEDY, with amendments

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NOVEMBER 15 (legislative day, NOVEMBER 1), 1977

Referred, by unanimous consent, to the Select Committee on Intelligence

A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Foreign Intelligence
- 4 Surveillance Act of 1977".

- 5 SEC. 2. Title 18, United States Code, is amended by
- 6 adding a new chapter after chapter 119 as follows:

II

1 **“Chapter 120.—ELECTRONIC SURVEILLANCE WITH-**
2 **IN THE UNITED STATES FOR FOREIGN INTEL-**
3 **LIGENCE PURPOSES**

“Sec.

“2521. Definitions.

“2522. Authorization for electronic surveillance for foreign intelligence purposes.

“2523. Designation of judges authorized to grant orders for electronic surveillance.

“2524. Application for an order.

“2525. Issuance of an order.

“2526. Use of information.

“2527. Report of electronic surveillance.”

4 **“§ 2521. Definitions**

5 “(a) Except as otherwise provided in this section the
6 definitions of section 2510 of this title shall apply to this
7 chapter.

8 “(b) As used in this chapter—

9 “(1) ‘Foreign power’ means—

10 “(A) a foreign government or any component
11 thereof, whether or not recognized by the United
12 States;

13 “(B) a faction of a foreign nation or nations,
14 not substantially composed of United States persons;

15 “(C) an entity, which is openly acknowledged
16 by a foreign government or governments to be
17 directed and controlled by such foreign government
18 or governments;

19 “(D) a foreign-based terrorist group;

1 “(E) a foreign-based political organization, not
2 substantially composed of United States persons; or

3 “(F) an entity which is directed and controlled
4 by a foreign government or governments.

5 “(2) ‘Agent of a foreign power’ means—

6 “(A) any person, other than a United States
7 citizen or an alien lawfully admitted for perma-
8 nent residence (as defined in section 101 (a) (20)
9 of the Immigration and Nationality Act), who—

10 “(i) is an officer or employee of a foreign
11 power;

12 “(ii) knowingly engages in clandestine in-
13 telligence activities for or on behalf of a foreign
14 power under circumstances which indicate that
15 such activities would be harmful to the security
16 of the United States; or

17 “(iii) conspires with or aids or abets *a any*
18 person, *knowing that such person is engaged in*
19 *activities* described in paragraph (ii) above;

20 “(B) any person who—

21 “(i) knowingly engages in clandestine
22 intelligence activities for or on behalf of a for-
23 eign power, which activities involve or will

1 involve a violation of the criminal statutes of
2 the United States;

3 “ (ii) knowingly engages in activities that
4 involve or will involve sabotage or terrorism
5 for or on behalf of a foreign power;

6 “ (iii) pursuant to the direction of an intel-
7 ligence service or intelligence network of a
8 foreign power, knowingly collects or transmits
9 information or material to an intelligence service
10 or intelligence network of a foreign power in a
11 manner intended to conceal the nature of such
12 information or material or the fact of such
13 transmission or collection, under circumstances
14 which indicate the transmission of such informa-
15 tion or material would be harmful to the security
16 of the United States, or that lack of knowledge
17 by the United States of such collection or trans-
18 mission would be harmful to the security of the
19 United States; or

20 “ (iv) conspires with or knowingly aids or
21 abets any person *knowing that such person is*
22 engaged in activities described in subsections B
23 (i) — ~~or~~ (iii) above.

24 “ (3) ‘Terrorism’ means activities which—

25 “ (A) are violent acts or acts dangerous to

1 human life which would be criminal under the laws
2 of the United States or of any State if committed
3 within its jurisdiction; and

4 “(B) appear to be intended—

5 “(i) to intimidate or coerce the civilian
6 population,

7 “(ii) to influence the policy of a govern-
8 ment by intimidation or coercion, or

9 “(iii) to affect the conduct of a govern-
10 ment by assassination or kidnaping.

11 “(4) ‘Sabotage’ means activities which would be
12 prohibited by title 18, United States Code, chapter 105,
13 if committed against the United States.

14 “(5) ‘Foreign intelligence information’ means—

15 “(A) information which relates to, and is
16 deemed necessary to the ability of the United States
17 to protect itself against, actual or potential attack or
18 other grave hostile acts of a foreign power or an
19 agent of a foreign power;

20 “(B) information with respect to a foreign
21 power or foreign territory, which relates to, and
22 because of its importance is deemed essential to—

23 “(i) the national defense or the security of
24 the Nation; or

1 “(ii) the successful conduct of the foreign
2 affairs of the United States;

3 “(C) information which relates to, and is
4 deemed necessary to the ability of the United States
5 to protect against terrorism by a foreign power or an
6 agent of a foreign power;

7 “(D) information which relates to, and is
8 deemed necessary to the ability of the United States
9 to protect against sabotage by a foreign power or an
10 agent of a foreign power; or

11 “(E) information which relates to, and is
12 deemed necessary to the ability of the United States
13 to protect against the clandestine intelligence activi-
14 ties of an intelligence service or network of a foreign
15 power or an agent of a foreign power.

16 “(6) ‘Electronic surveillance’ means—

17 “(A) the acquisition by an electronic, mechan-
18 ical, or other surveillance device of the contents of
19 any wire or radio communication sent by or intended
20 to be received by a particular, known United States
21 person who is in the United States, where the con-
22 tents are acquired by intentionally targeting that
23 United States person, under circumstances in which
24 a person has a reasonable expectation of privacy and

1 a warrant would be required for law enforcement
2 purposes;

3 “(B) the acquisition by an electronic, mechan-
4 ical, or other surveillance device, of the contents of
5 any wire communication to or from a person in the
6 United States, without the consent of any party
7 thereto, where such acquisition occurs in the United
8 States while the communication is being trans-
9 mitted by wire;

10 “(C) the intentional acquisition, by an elec-
11 tronic, mechanical, or other surveillance device, of
12 the contents of any radio communication, under
13 circumstances in which a person has a reasonable
14 expectation of privacy and a warrant would be
15 required for law enforcement purposes, and where
16 both the sender and all intended recipients are lo-
17 cated within the United States; or

18 “(D) the installation or use of an electronic,
19 mechanical, or other surveillance device in the
20 United States for monitoring to acquire information,
21 other than from a wire or radio communication,
22 under circumstances in which a person has a reason-
23 able expectation of privacy and a warrant would be
24 required for law enforcement purposes.

1 “(7) ‘Attorney General’ means the Attorney Gen-
2 eral of the United States (or Acting Attorney General)
3 or an Assistant Attorney General specially designated
4 in writing by the Attorney General—*or the Deputy*
5 Attorney General.

6 “(8) ‘Minimization procedures’ means procedures
7 which are reasonably designed to minimize the acquisi-
8 tion, retention, and *prohibit the dissemination, except*
9 *as provided for in subsections 2526 (a) and (b)*, of
10 any information concerning United States persons with-
11 out their consent that does not relate to the ability of
12 the United States—

13 “(A) to protect itself against actual or potential
14 attack or other grave hostile acts of a foreign power
15 or an agent of a foreign power;

16 “(B) to provide for the national defense or
17 security of the Nation;

18 “(C) to provide for the conduct of the foreign
19 affairs of the United States;

20 “(D) to protect against terrorism by a foreign
21 power or an agent of a foreign power;

22 “(E) to protect against sabotage by a foreign
23 power or an agent of a foreign power; or

24 “(F) to protect against the clandestine in-
25 telligence activities of an intelligence service or net-

1 work of a foreign power or an agent of a foreign
2 power;
3 and which are reasonably designed to insure that infor-
4 mation which relates solely to the conduct of foreign
5 affairs shall not be maintained in such a manner as to
6 permit the retrieval of such information by reference to a
7 United States person, without his consent, who was a
8 party to a communication acquired pursuant to this
9 chapter; and if the target of the electronic surveillance
10 is a foreign power which qualifies as such solely on the
11 basis that it is an entity controlled and directed by a
12 foreign government or governments, and unless there is
13 probable cause to believe that a substantial number of
14 the officers or executives of such entity are officers or
15 employees of a foreign government, or agents of a foreign
16 power as defined in section 2521 (b) (2) (B), proce-
17 dures which are reasonably designed to prevent the
18 acquisition, retention, and dissemination of communica-
19 tions of unconsenting United States persons who are not
20 officers or executives of such entity responsible for those
21 areas of its activities which involve foreign intelligence
22 information.

23 “(9) ‘United States person’ means a citizen of the
24 United States, an alien lawfully admitted for permanent
25 residence (as defined in section 101 (a) (20) of the

1 Immigration and Nationality Act), an unincorporated
2 association a substantial number of members of which are
3 citizens of the United States or aliens lawfully admitted
4 for permanent residence or a corporation which is incor-
5 porated in the United States, but not including corpora-
6 tions *or associations* which are foreign powers.

7 “(10) ‘United States’ when used in a geographic
8 sense means all areas under the territorial sovereignty of
9 the United States, the Trust Territory of the Pacific
10 Islands, and the Canal Zone.

11 **“§ 2522. Authorization for electronic surveillance for for-
12 eign intelligence purposes**

13 “Applications for a court order under this chapter are
14 authorized if the President has, by written authorization,
15 empowered the Attorney General to approve applications to
16 Federal judges having jurisdiction under section 2523 of
17 this chapter, and a judge to whom an application is made
18 may grant an order, in conformity with section 2525 of this
19 chapter, approving electronic surveillance of a foreign power
20 or an agent of a foreign power for the purpose of obtaining
21 foreign intelligence information.

22 **“§ 2523. Designation of judges authorized to grant orders
23 for electronic surveillance**

24 “(a) The Chief Justice of the United States shall pub-
25 licly designate seven district court judges, each of whom

1 shall have jurisdiction to hear applications for and grant
2 orders approving electronic surveillance anywhere within the
3 United States under the procedures set forth in this chap-
4 ter, except that no judge designated under this subsection
5 shall have jurisdiction of the same application for electronic
6 surveillance under this chapter which has been denied previ-
7 ously by another judge designated under this subsection. If
8 any judge so designated denies an application for an order
9 authorizing electronic surveillance under this chapter, such
10 judge shall provide immediately for the record a written
11 statement of each reason for his decision and, on motion of
12 the United States, the record shall be transmitted, under
13 seal, to the special court of review established in subsec-
14 tion (b).

15 “(b) The Chief Justice shall publicly designate three
16 judges, one of whom shall be publicly designated as the pre-
17 siding judge, from the United States district courts or courts
18 of appeals who together shall comprise a special court of
19 review which shall have jurisdiction to review the denial of
20 any application made under this chapter. If such special
21 court determines that the application was properly denied,
22 the special court shall immediately provide for the record
23 a written statement of each reason for its decision and, on
24 petition of the United States for a writ of certiorari, the

1 record shall be transmitted under seal to the Supreme Court,
2 which shall have jurisdiction to review such decision.

3 “(c) Proceedings under this chapter shall be conducted
4 as expeditiously as possible. The record of proceedings under
5 this chapter, including applications made and orders granted,
6 shall be sealed and maintained under security measures estab-
7 lished by the Chief Justice in consultation with the Attorney
8 General and the Director of Central Intelligence.

9 **“§ 2524. Application for an order**

10 “(a) Each application for an order approving electronic
11 surveillance under this chapter shall be made by a Federal
12 officer in writing upon oath or affirmation to a judge having
13 jurisdiction under section 2523 of this chapter. Each appli-
14 cation shall require the approval of the Attorney General
15 based upon his finding that it satisfies the criteria and require-
16 ments of such application as set forth in this chapter. It shall
17 include the following information—

18 “(1) the identity of the Federal officer making the
19 application;

20 “(2) the authority conferred on the Attorney Gen-
21 eral by the President of the United States and the ap-
22 proval of the Attorney General to make the application;

23 “(3) the identity or a description of the target of
24 the electronic surveillance;

1 “(4) a statement of the facts and circumstances
2 relied upon by the applicant to justify his belief that—

3 “(A) the target of the electronic surveillance
4 is a foreign power or an agent of a foreign power;
5 and

6 “(B) the facilities or the place at which the
7 electronic surveillance is directed are being used,
8 or are about to be used, by a foreign power or an
9 agent of a foreign power;

10 “(5) a statement of the proposed minimization
11 procedures;

12 “(6) when the target of the surveillance is not a
13 foreign power as defined in section 2521 (b) (1) (A),
14 (B) or (C), a detailed description of the nature of the
15 information sought;

16 “(7) a certification or certifications by the Assist-
17 ant to the President for National Security Affairs or an
18 executive branch official or officials designated by the
19 President from among those executive officers employed
20 in the area of national security or defense and appointed
21 by the President with the advice and consent of the
22 Senate—

23 “(A) that the information sought is foreign
24 intelligence information;

1 “(B) that the purpose of the surveillance is to
2 obtain foreign intelligence information;

3 “(C) that such information cannot reasonably
4 be obtained by normal investigative techniques;

5 “(D) including a designation of the type of
6 foreign intelligence information being sought accord-
7 ing to the categories described in section 2521
8 (b) (5) ;

9 “(E) when the target of the surveillance is not
10 a foreign power, as defined in section 2521 (b) (1)
11 (A), (B), or (C), including a statement of the
12 basis for the certification that—

13 “(i) the information sought is the type of
14 foreign intelligence information designated; and

15 “(ii) such information cannot reasonably
16 be obtained by normal investigative techniques;

17 “(F) when the target of the surveillance is a
18 foreign power, as defined in section 2521 (b) (1)
19 (A), (B), or (C), stating the period of time for
20 which the surveillance is required to be maintained;

21 “(8) when the target of the surveillance is not a
22 foreign power, as defined in section 2521 (b) (1) (A),
23 (B), or (C), a statement of the means by which the
24 surveillance will be effected, and when the target is a

1 foreign power, as defined in section 2521 (b) (1) (A),
2 (B), or (C), a designation of the type of electronic sur-
3 veillance to be used according to the categories described
4 in section 2521 (b) (6), *and a statement whether physi-*
5 *cal entry is required to effect the surveillance;*

6 “ (9) a statement of the facts concerning all previous
7 applications that have been made to any judge under
8 this chapter involving any of the persons, facilities, or
9 places specified in the application, and the action taken
10 on each previous application; and

11 “ (10) when the target of the surveillance is not a
12 foreign power, as defined in section 2521 (b) (1) (A),
13 (B), or (C), a statement of the period of time for which
14 the electronic surveillance is required to be maintained.
15 If the nature of the intelligence gathering is such that
16 the approval of the use of electronic surveillance under
17 this chapter should not automatically terminate when
18 the described type of information has first been obtained,
19 a description of facts supporting the belief that addi-
20 tional information of the same type will be obtained
21 thereafter.

22 “ (b) The Attorney General may require any other
23 affidavit or certification from any other officer in connection
24 with the application.

1 “(c) The judge may require the applicant to furnish
2 such other information as may be necessary to make the
3 determinations required by section 2525 of this chapter.

4 “§ 2525. Issuance of an order

5 “(a) Upon an application made pursuant to section
6 2524 of this title, the judge shall enter an ex parte order as
7 requested or as modified approving the electronic surveil-
8 lance if he finds that—

9 “(1) the President has authorized the Attorney
10 General to approve applications for electronic surveil-
11 lance for foreign intelligence information;

12 “(2) the application has been made by a Federal
13 officer and approved by the Attorney General;

14 “(3) on the basis of the facts submitted by the
15 applicant there is probable cause to believe that—

16 “(A) the target of the electronic surveillance
17 is a foreign power or an agent of a foreign power;

18 **and**

19 “(B) the facilities or place at which the elec-
20 tronic surveillance is directed are being used, or are
21 about to be used, by a foreign power or an agent
22 of a foreign power;

23 “(4) the proposed minimization procedures meet
24 the definition of minimization procedures under section
25 2521 (b) (8) of this title;

1 “(5) the application which has been filed contains
2 the description and certification or certifications, spec-
3 ified in section 2524 (a) (7) and, if the target is a
4 United States person, the certification or certifications
5 are not clearly erroneous on the basis of the statement
6 made under section 2524 (a) (7) (E).

7 “(b) An order approving an electronic surveillance
8 under this section shall—

9 “(1) specify—

10 “(A) the identity or a description of the target
11 of the electronic surveillance;

12 “(B) the nature and location of the facilities or
13 the place at which the electronic surveillance will be
14 directed;

15 “(C) *when the target of the surveillance is not*
16 *a foreign power as defined in section 2521(b)(1)*
17 *(A), (B), or (C), the type of information sought*
18 *to be acquired and when the target is a foreign*
19 *power defined in section 2521(b)(1) (A), (B), or*
20 *(C), the designation of the type of foreign intelli-*
21 *gence information under section 2521(b)(5) sought*
22 *to be acquired;*

23 “(D) when the target of the surveillance is not
24 a foreign power, as defined in section 2521 (b) (1)

1 (A), (B), or (C), the means by which the elec-
2 tronic surveillance will be effected, and when the tar-
3 get is a foreign power, as defined in section 2521 (b)
4 (1) (A), (B), or (C), a designation of the type
5 of electronic surveillance to be used according to the
6 categories described in section 2521 (b) (6) *and*
7 *whether physical entry will be used to effect the sur-*
8 *veillance; and*

9 “(E) the period of time during which the elec-
10 tronic surveillance is approved; and

11 “(2) direct—

12 “(A) that the minimization procedures be
13 followed;

14 “(B) that, upon the request of the applicant, a
15 specified communication or other common carrier,
16 landlord, custodian, contractor; or other specified
17 person furnish the applicant forthwith any and all
18 information, facilities, or technical assistance, neces-
19 sary to accomplish the electronic surveillance in such
20 manner as will protect its secrecy and produce a
21 minimum of interference with the services that such
22 carrier, landlord, custodian, contractor, or other per-
23 son is providing that target of electronic surveillance;

24 “(C) that such carrier, landlord, custodian, or
25 other person maintain under security procedures

1 approved by the Attorney General and the Director
2 of Central Intelligence any records concerning the
3 surveillance or the aid furnished which such person
4 wishes to retain;

5 “(D) that the applicant compensate, at the
6 prevailing rate, such carrier, landlord, custodian, or
7 other person for furnishing such aid.

8 “(c) An order issued under this section may approve
9 an electronic surveillance not targeted against a foreign
10 power, as defined in section 2521 (b) (1) (A), (B), or
11 (C), for the period necessary to achieve its purpose, or for
12 ninety days, whichever is less; an order under this section
13 shall approve an electronic surveillance targeted against a
14 foreign power, as defined in section 2521 (b) (1) (A),
15 (B), or (C) for the period specified in the certification
16 required in section 2524 (a) (7) (F), or for one year, which-
17 ever is less. Extensions of an order issued under this chapter
18 may be granted on the same basis as an original order upon
19 an application for an extension made in the same manner as
20 required for an original application and after new findings
21 required by subsection (a) of this section. In connection with
22 applications for extensions where the target is not a foreign
23 power, as defined in section 2521 (b) (1) (A), (B), or
24 (C), the judge may require the applicant to submit informa-
25 tion, obtained pursuant to the original order or to any previ-

1 ous extensions, as may be necessary to make new findings of
2 probable cause.

3 “(d) Notwithstanding any other provision of this chapter
4 when the Attorney General reasonably determines that—

5 “(1) an emergency situation exists with respect to
6 the employment of electronic surveillance to obtain for-
7 eign intelligence information before an order authorizing
8 such surveillance can with due diligence be obtained, and

9 “(2) the factual basis for issuance of an order under
10 this chapter to approve such surveillance exists, he may
11 authorize the emergency employment of electronic sur-
12 veillance if a judge designated pursuant to section 2523
13 of this chapter is informed by the Attorney General or
14 his designate at the time of such authorization that the
15 decision has been made to employ emergency electronic
16 surveillance and if an application in accordance with this
17 chapter is made to that judge as soon as practicable, but
18 not more than twenty-four hours after the Attorney Gen-
19 eral authorizes such acquisition. If the Attorney General
20 authorizes such emergency employment of electronic
21 surveillance, he shall require that the minimization proce-
22 dures required by this chapter for the issuance of a judi-
23 cial order be followed. In the absence of a judicial order
24 approving such electronic surveillance, the surveillance
25 shall terminate when the information sought is obtained,

1 when the application for the order is denied, or after the
2 expiration of twenty-four hours from the time of au-
3 thorization by the Attorney General, whichever is earli-
4 est. In the event that such application for approval is
5 denied, or in any other case where the electronic sur-
6 veillance is terminated without an order having been
7 issued, no information obtained or evidence derived from
8 such surveillance shall be received in evidence or other-
9 wise disclosed in any trial, hearing, or other proceeding
10 in or before any court, grand jury, department, office,
11 agency, regulatory body, legislative committee, or other
12 authority of the United States, a State, or political sub-
13 division thereof. A denial of the application made under
14 this subsection may be reviewed as provided in section
15 2523.

16 **“§ 2526. Use of information**

17 “(a) Information concerning United States persons
18 acquired from an electronic surveillance conducted pursuant
19 to this chapter may be used and disclosed by Federal officers
20 and employees without the consent of the United States per-
21 son only for purposes specified in section 2521 (b) (8) (A)
22 through (F), or for the enforcement of the criminal law if
23 its use outweighs the possible harm to the national security.
24 No otherwise privileged communication obtained in accord-
25 ance with, or in violation of, the provisions of this chapter

1 shall lose its privileged character. *No information acquired*
2 *from an electronic surveillance conducted pursuant to this*
3 *chapter may be used or disclosed by Federal officers or em-*
4 *ployees except for lawful purposes.*

5 “(b) The minimization procedures required under this
6 chapter shall not preclude the retention and disclosure, for
7 law enforcement purposes, of any information which consti-
8 tutes evidence of a crime if such disclosure is accompanied by
9 a statement that such evidence, or any information derived
10 therefrom, may only be used in a criminal proceeding with
11 the advance authorization of the Attorney General.

12 “(c) Whenever the Government intends to enter into
13 evidence or otherwise use or disclose in any trial, hearing,
14 or other proceeding in or before any court, department,
15 officer, agency, or other authority of the United States, *a*
16 *State, or a political subdivision thereof,* any information
17 obtained or derived from an electronic surveillance, the Gov-
18 ernment shall prior to the trial, hearing, or other proceeding
19 or at a reasonable time prior to an effort to so disclose or so
20 use the information or submit it in evidence notify the court
21 in which the information is to be disclosed or used or, if the
22 information is to be disclosed or used in or before another
23 authority, shall notify a court in the district wherein the
24 information is to be so disclosed or so used that the Govern-
25 ment intends to so disclose or so use such information. ~~When-~~

1 ever any court is so notified, or whenever a motion is made
2 pursuant to section 3504 of this title, or any other statute or
3 rule of the United States to suppress evidence on the grounds
4 that it was obtained or derived from an unlawful electronic
5 surveillance, the court, or where the motion is made before
6 another authority, a court in the same district as the author-
7 ity, shall notwithstanding any other law, if the Government
8 by affidavit asserts that an adversary hearing would harm
9 the national security or the foreign affairs of the United
10 States, review in camera and ex parte the application, order,
11 and so much of the transcript of the surveillance as may be
12 necessary to determine whether the surveillance was author-
13 ized and conducted in a manner that did not violate any right
14 afforded by the Constitution and statutes of the United States
15 to the person aggrieved: *Provided*, That in making this
16 determination, the court shall disclose to the aggrieved person
17 portions of the application, order, or transcript only where
18 such disclosure is necessary for an accurate determination of
19 the legality of the surveillance. If the court determines that
20 the electronic surveillance of the person aggrieved was not
21 lawfully authorized or conducted, the court shall in accord-
22 ance with the requirements of law suppress that information
23 which was obtained or evidence derived unlawfully from the
24 electronic surveillance of the person aggrieved.

25 “(d) Any person who has been a subject of electronic

1 *surveillance and against whom evidence derived from such*
2 *electronic surveillance is to be, or has been, introduced or*
3 *otherwise used or disclosed in any trial, hearing, or proceeding*
4 *in or before any court, department officer, agency, regulatory*
5 *body, or other authority of the United States, a State, or a*
6 *political subdivision thereof, may move to suppress the con-*
7 *tents of any communication acquired by electronic surveil-*
8 *lance, or evidence derived therefrom, on the grounds that—*

9 “(1) *the communication was unlawfully acquired;*

10 *or*

11 “(2) *the surveillance was not made in conformity*
12 *with the order of authorization or approval.*

13 *Such motion shall be made before the trial, hearing, or pro-*
14 *ceeding unless there was no opportunity to make such motion*
15 *or the person was not aware of the grounds of the motion.*

16 “(e) *Whenever any court is notified in accordance with*
17 *subsection (c), or whenever a motion is made by an aggrieved*
18 *person pursuant to subsection (d), to suppress evidence on*
19 *the grounds that it was obtained or derived from an unlawful*
20 *electronic surveillance, or whenever any motion or request is*
21 *made by an aggrieved person pursuant to section 3504 of this*
22 *title or any other statute or rule of the United States, to dis-*
23 *cover, obtain, or suppress evidence or information obtained or*
24 *derived from electronic surveillance, the Federal court, or*
25 *where the motion is made before another authority, a Federal*

1 court in the same district as the authority, shall, notwithstanding
2 ing any other law, if the Government by affidavit asserts that
3 disclosure or an adversary hearing would harm the national
4 security of the United States, review in camera and ex parte
5 the application, order, and other materials relating to the sur-
6 veillance as may be necessary to determine whether the surveil-
7 lance was authorized and conducted in a manner that did not
8 violate any right afforded by the Constitution and statutes of
9 the United States to the aggrieved person. In making this
10 determination, the court shall disclose to the aggrieved person
11 portions of the application, order, or other materials relating
12 to the surveillance only where such disclosure is necessary to
13 make an accurate determination of the legality of the surveil-
14 lance. If the court determines that the electronic surveillance
15 of the aggrieved person was not lawfully authorized or con-
16 ducted, the court shall in accordance with the requirements of
17 law suppress the information obtained or evidence derived
18 from the unlawful electronic surveillance. If the court deter-
19 mines that the surveillance was lawfully authorized and con-
20 ducted, the court shall deny any motion for disclosure or
21 discovery unless required by due process.

22 “(d) (f) If an emergency employment of the electronic
23 surveillance is authorized under section 2525 (d) and a sub-
24 sequent order approving the surveillance is not obtained, the
25 judge shall cause to be served on any United States person

1 named in the application and on such other United States
2 persons subject to electronic surveillance as the judge may
3 determine in his discretion it is in the interest of justice to
4 serve, notice of—

5 “(1) the fact of the application;

6 “(2) the period of the surveillance; and

7 “(3) the fact that during the period information
8 was or was not obtained.

9 On an ex parte showing of good cause to the judge the serv-
10 ing of the notice required by this subsection may be post-
11 poned or suspended for a period not to exceed ninety days.
12 Thereafter, on a further ex parte showing of good cause, the
13 court shall forego ordering the serving of the notice required
14 under this subsection.

15 **“§ 2527. Report of electronic surveillance**

16 “In April of each year, the Attorney General shall
17 report to the Administrative Office of the United States
18 Courts and shall transmit to Congress with respect to the
19 preceding calendar year—

20 “(1) the total number of applications made for
21 orders and extensions of orders approving electronic
22 surveillance; and

23 “(2) the total number of such orders and exten-
24 sions either granted, modified, or denied.”.

1 SEC. 3. The provisions of this Act and the amendment
2 made hereby shall become effective upon enactment: *Pro-*
3 *vided*, That any electronic surveillance approved by the
4 Attorney General to gather foreign intelligence information
5 shall not be deemed unlawful for failure to follow the proce-
6 dures of chapter 120, title 18, United States Code, if that sur-
7 veillance is terminated or an order approving that surveillance
8 is obtained under this chapter within ninety days following
9 the designation of the first judge pursuant to section 2523 of
10 chapter 120, title 18, United States Code.

11 SEC. 4. Chapter 119 of title 18, United States Code, is
12 amended as follows:

13 (a) Section 2511 (1) is amended—

14 (1) by inserting “or chapter 120 or with respect to
15 techniques used by law enforcement officers not involv-
16 ing the interception of wire or oral communications
17 as otherwise authorized by a search warrant or order of
18 a court of competent jurisdiction,” immediately after
19 “chapter” in the first sentence;

20 (2) by inserting a comma and “or, under color of
21 law, willfully engages in any other form of electronic
22 surveillance as defined in chapter 120” immediately
23 before the semicolon in paragraph (a) ;

24 (3) by inserting “or information obtained under

1 color of law by any other form of electronic surveillance
2 as defined in chapter 120” immediately after “contents
3 of any wire or oral communication” in paragraph (c) ;

4 (4) by inserting “or any other form of electronic
5 surveillance, as defined in chapter 120,” immediately
6 before “in violation” in paragraph (c) ;

7 (5) by inserting “or information obtained under
8 color of law by any other form of electronic surveillance
9 as defined in chapter 120” immediately after “any wire
10 or oral communication” in paragraph (d) ; and

11 (6) by inserting “or any other form of electronic
12 surveillance, as defined in chapter 120,” immediately
13 before “in violation” in paragraph (d) .

14 (b) (1) Section 2511 (2) (a) (i) is amended by insert-
15 ing the words “or radio communication” after the words
16 “wire communication” and by inserting the words “or other-
17 wise acquire” after the word “intercept”.

18 (2) Section 2511 (2) (a) (ii) is amended by inserting
19 the words “or chapter 120” after the second appearance of
20 the word “chapter,” and by striking the period at the end
21 thereof and adding the following: “or engage in electronic
22 surveillance, as defined in chapter 120: *Provided, however,*
23 *That before the information, facilities, or technical assistance*
24 *may be provided, the investigative or law enforcement officer*

1 shall furnish to the officer, employee, or agent of the carrier
2 either—

3 “ (1) an order signed by the authorizing judge certi-
4 fying that a court order directing such assistance has
5 been issued; or

6 “ (2) in the case of an emergency interception or
7 electronic surveillance as provided for in section 2518
8 (7) of this chapter or section 2525 (d) of chapter 120,
9 a certification under oath by *the* investigative or law
10 enforcement officer that the applicable statutory require-
11 ments have been met,

12 and setting forth the period of time for which the electronic
13 surveillance is authorized and describing the facilities from
14 which the communication is to be acquired. Any violation of
15 this subsection by a communication common carrier or an
16 officer, employee, or agency thereof, shall render the carrier
17 liable for the civil damages provided for in section 2520.”.

18 (c) (1) Section 2511 (2) (b) is amended by inserting
19 the words “or otherwise engage in electronic surveillance, as
20 defined in chapter 120,” after the word “radio”.

21 (2) Section 2511 (2) (c) is amended by inserting the
22 words “or engage in electronic surveillance, as defined in
23 chapter 120,” after the words “oral communication” and by

1 inserting the words "or such surveillance" after the last word
2 in the paragraph and before the period.

3 (3) Section 2511 (2) is amended by adding at the end
4 of the section the following provisions:

5 "(c) Notwithstanding any other provision of this title
6 or sections 605 or 606 of the Communications Act of 1934,
7 it shall not be unlawful for an officer, employee, or agent of
8 the United States in the normal course of his official duty to
9 conduct electronic surveillance as defined in section 2521
10 (b) (6) of chapter 120 without a court order for the sole
11 purpose of:

12 "(i) testing the capability of electronic equipment,
13 provided that *no particular United States person shall*
14 *be intentionally targeted for testing purposes without*
15 *his consent*, the test period shall be limited in extent
16 and duration to that necessary to determine the capabil-
17 ity of the equipment, that the content of any communica-
18 tion acquired under this paragraph shall be retained
19 and used only for the purpose of determining the ca-
20 pability of such equipment, shall be disclosed only to the
21 persons conducting the test, and shall be destroyed upon
22 completion of the testing, and that the test may exceed
23 ninety days only with the prior approval of the Attorney
24 General; or

25 "(ii) determining the existence and capability of

1 electronic surveillance equipment being used unlawfully,
2 provided that such electronic surveillance shall be lim-
3 ited in extent and duration to that necessary to deter-
4 mine the existence and capability of such equipment,
5 and that any information acquired by such surveillance
6 shall be used only to enforce this chapter or section 605
7 of the Communications Act of 1934 or to protect infor-
8 mation from unlawful electronic surveillance.

9 “(f) Nothing contained in this chapter, or section 605
10 of the Communications Act of 1934 (47 U.S.C. 605) shall
11 be deemed to affect the acquisition by the United States
12 Government of foreign intelligence information from inter-
13 national communications by a means other than electronic
14 surveillance as defined in section 2521 (b) (6) of this title;
15 and the procedures in this chapter and chapter 120 of this
16 title, shall be the exclusive means by which electronic sur-
17 veillance, as defined in section 2521 (b) (6) of chapter 120,
18 and the interception of domestic wire and oral communica-
19 tions may be conducted.”

20 (d) Section 2511 (3) is repealed.

21 (e) Section 2515 is amended by inserting the words
22 “or electronic surveillance, as defined in chapter 120, has
23 been conducted” after the word “intercepted”, by inserting
24 the words “or other information obtained from electronic
25 surveillance, as defined in chapter 120,” after the second

1 appearance of the word "communication", and by inserting
2 "or chapter 120" after the final appearance of the word
3 "chapter".

4 (f) Section 2518 (1) is amended by inserting the words
5 "under this chapter" after the word "communication".

6 (g) Section 2518 (4) is amended by inserting the words
7 "under this chapter" after both appearances of the words
8 "wire or oral communication".

9 (h) Section 2518 (9) is amended by striking the word
10 "intercepted" and inserting the words "intercepted pursuant
11 to this chapter" after the word "communication".

12 (i) Section 2518(10) is amended by striking the word
13 "intercepted" and inserting the words "intercepted pursuant
14 to this chapter" after the first appearance of the word "com-
15 munication".

16 ~~(i)~~ (j) Section 2519 (3) is amended by inserting the
17 words "pursuant to this chapter" after the words "wire or
18 oral communications" and after the words "granted or de-
19 nied".

20 ~~(j)~~ (k) Section 2520 is amended by deleting all before
21 subsection (2) and inserting in lieu thereof: "Any person
22 other than a foreign power or an agent of a foreign power
23 as defined in sections 2521 (b) (1) and 2521 (b) (2) (A)
24 of chapter 120, who has been subject to electronic surveil-
25 lance, as defined in chapter 120, or whose wire or oral com-

1 munication has been intercepted, or about whom informa-
2 tion has been disclosed or used, in violation of this chapter,
3 shall (1) have a civil cause of action against any person
4 who so acted in violation of this chapter and”.

95TH CONGRESS
1ST SESSION

S. 1566

[Report No. 95-604]

A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

By Mr. KENNEDY, Mr. BAYH, Mr. EASTLAND,
Mr. INOUYE, Mr. McCLELLAN, Mr. MATTHIAS,
Mr. NELSON, Mr. THURMOND, Mr. HURDLE-
STON, and Mr. GARN

May 18 (legislative day, May 16), 1977

Read twice and referred by unanimous consent to the Committee on the Judiciary, and, if and when reported, then to the Select Committee on Intelligence

NOVEMBER 15 (legislative day, NOVEMBER 1), 1977

Reported with amendments

NOVEMBER 15 (legislative day, NOVEMBER 1), 1977

Referred, by unanimous consent, to the Select Committee on Intelligence